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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. EDWARD OSCAR GRANADOS, Petitioner.	2 CA-CR 2008-0152-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20061469

Honorable Stephen C. Villarreal, Judge

REVIEW GRANTED; RELIEF DENIED

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P E L A N D E R, Chief Judge.

¶1 Petitioner Edward Granados challenges the trial court's denial of relief on his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We grant review but deny relief.

Background

¶2 Pursuant to a plea agreement, Granados pled guilty to theft of a means of transportation by controlling stolen property. The trial court imposed an aggravated, seven-year prison term. The court cited Granados's prior felony conviction and the impact of the crime on the victim as aggravating circumstances and Granados's age as a mitigating circumstance. At sentencing, Granados ascribed the cause of his criminal activity to his addiction to drugs.

¶3 Granados subsequently sought post-conviction relief, arguing that newly discovered mitigating evidence required resentencing; that his counsel had been ineffective in failing to discover the evidence; and that the trial court improperly weighed the mitigating evidence presented at sentencing. The trial court denied the petition, and this petition for review followed.

Discussion

¶4 Granados contends he is entitled to post-conviction relief "because significant mitigating evidence either was not discovered until after sentencing or was unavailable due to ineffective assistance of counsel." He urges this court to "grant review and remand the case for a re-sentencing or an evidentiary hearing." We will not disturb the trial court's

ruling unless it clearly abused its discretion. *State v. Mata*, 185 Ariz. 319, 331, 916 P.2d 1035, 1047 (1996); *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990).

I. Newly discovered evidence

¶5 Granados first maintains that "[n]ewly-discovered evidence requires a re-sentencing." To warrant post-conviction relief based on newly discovered evidence, a defendant must meet five requirements:

> (1) [T]he evidence must appear on its face to have existed at the time of trial but be discovered after trial; (2) the motion must allege facts from which the court could conclude the defendant was diligent in discovering the facts and bringing them to the court's attention; (3) the evidence must not simply be cumulative or impeaching; (4) the evidence must be relevant to the case; [and] (5) the evidence must be such that it would likely have altered the verdict, finding, or sentence if known at the time of trial.

State v. Bilke, 162 Ariz. 51, 52-53, 781 P.2d 28, 29-30 (1989); *see also* Ariz. R. Crim. P. 32.1(e).

¶6 In his petition for review, Granados first discusses his abusive childhood, evidence of which was not disclosed to the trial court at sentencing. Although he cited such evidence in his petition below as newly discovered, he now acknowledges he "obviously knew about his traumatic background prior to sentencing." "Evidence is not newly discovered unless it was unknown to the trial court, the defendant, or counsel at the time of trial and neither the defendant nor counsel could have known about its existence by the exercise of due diligence." *State v. Saenz*, 197 Ariz. 487, ¶ 13, 4 P.3d 1030, 1033 (App. 2000). And, "'[e]vidence known to the defendant is not newly discovered, even if it is not

known to his counsel.'" *Id.*, *quoting Commonwealth v. Osorno*, 568 N.E.2d 627, 631 (Mass. App. Ct. 1991). Thus, because it was known to Granados at the time of sentencing, evidence of his childhood abuse and "traumatic background" was not newly discovered.

¶7 Additionally, Granados alleges that a post-sentencing diagnosis of depression was newly discovered evidence entitling him to be resentenced. Based on a psychological evaluation they conducted about ten months after sentencing, two psychologists opined in their report that Granados "has a history of debilitating depression up until and including the time of the offense." The psychologists also observed and reported on several cognitive deficits Granados has. Although they opined that these factors "do[] not in any way excuse [Granados's] actions," the psychologists viewed them as "major mitigating factors" worthy of the court's consideration in possibly modifying his sentence.[1]

¶8 Citing and expounding on *Bilke*, Granados argues that, because he "had never undergone a psychological evaluation until the post-conviction investigation, evidence of his debilitating depression . . . was not available at sentencing" and entitles him to post-conviction relief. We first question, however, whether he adequately raised this issue in his petition for post-conviction relief. Although he stated below that "his debilitating depression was not identified until the evaluation conducted for this petition," he did not make the argument he presents now based on *Bilke*. Rather, he simply asserted that his "depression

[1]Without citing the record, Granados contended below and contends on review that, "[i]f not for his traumatic background and severe depression, he would not have abused drugs and used a truck he had reason to believe was stolen." We find no support for that assertion in the psychological report or elsewhere in the record.

and co-occurring addiction at the time of his offense [we]re significant mitigating factors for th[e] Court's consideration."

¶9 This court does not consider issues that have not been ruled on by the trial court and are raised or adequately presented for the first time in a petition for review. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (petitioner may not present new issues on review). But even had Granados adequately presented this issue below, two factors support the trial court's ruling. First, in view of the "history of debilitating depression" and apparently longstanding cognitive deficits on which the psychologists reported, the record does not reflect why those conditions could not and should not have been detected before and argued at sentencing. Granados presented no "facts from which the [trial] court could conclude [he] was diligent in discovering the facts and bringing them to the court's attention." *Bilke*, 162 Ariz. at 52-53, 781 P.2d at 29-30; *see also Saenz*, 197 Ariz. 487, ¶ 13, 4 P.3d at 1033 (requirement of newly discovered evidence is that defendant have been diligent in discovering evidence).

¶10 Second, and on a related point, a presentence report from Granados's prior conviction noted he "endorsed several symptoms related to depression, including suicidal ideation." The trial court considered that presentence report at sentencing in this case and noted the evidence again in ruling on Granados's Rule 32 petition. Thus, although the full psychological report was not prepared or presented to the court until after sentencing, the court was aware at sentencing that, at a minimum, Granados had exhibited serious symptoms of depression. Accordingly, because the court did not view the new psychological evidence

as "likely [to] have altered the . . . sentence if known at the time of [sentencing]," *Bilke*, 162 Ariz. at 53, 781 P.2d at 30, we cannot say it abused its discretion in rejecting Granados's claim of newly discovered evidence.

II. Ineffective assistance of counsel

¶11 Granados also asserts his trial counsel "was ineffective because he failed to investigate and present mitigating evidence." According to Granados, counsel "didn't discuss [his] case with [him] until the day of . . . sentencing," "did not ask [him] about [his] family background[,] and didn't do much to prepare for [his] sentencing." And, although Granados did not disclose his abusive family history in his presentence interview with the probation department, he averred he "would have told [counsel] about [his] parents' abuse and drug use" and about his abusive childhood if counsel had asked about his "family background and why [he] began to use drugs."

¶12 To be entitled to relief on a claim of ineffective assistance of counsel, Granados was required to show both that his counsel's performance fell below an objectively reasonable professional standard and caused prejudice to the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). If a petitioner fails to establish either prong of the *Strickland* test, the claim necessarily fails. *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985).

¶13 Granados concedes that his "traumatic background is not apparent from the presentence reports, which characterized [his] parental influence as 'positive.'" But he asserts that, because of his history of drug abuse, counsel should have asked him about

"when and how he became addicted" and should have "determine[d] whether a psychological evaluation was necessary." As Granados points out, a "defendant's attorney ha[s] the obligation to challenge the admission of aggravating evidence where reasonably possible and to present available pertinent mitigating evidence." *State v. Carriger*, 132 Ariz. 301, 304, 645 P.2d 816, 819 (1982). In keeping with that duty, counsel must investigate such mitigating evidence. *See Wiggins v. Smith*, 539 U.S. 510, 522-23 (2003).

¶14 "The reasonableness of counsel's actions[, however,] may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, . . . on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information." *Strickland*, 466 U.S. at 691. "And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." *Id.*

¶15 In the interview for his presentence report, Granados described his childhood as taking place "in an intact home." He also stated "his relationship with his parents was positive" and that "[h]is father was responsible for discipline that consisted of non-corporal methods and spanking by hand." Thus, the information Granados had provided suggested an investigation into his childhood and family background would be fruitless.

¶16 This situation stands in contrast to that in *Wiggins*, on which Granados relies. In that case, counsel had reports noting Wiggins's "'misery as a youth'"; his time spent in foster homes; and his own description of his background as "'disgusting.'" *Wiggins*, 539

U.S. at 523. No such information was available to Granados's counsel to suggest that he should further investigate Granados's "troubled background and its role in [his] substance abuse," as Granados claims. Under those circumstances, the trial court could have readily found that counsel made a reasonable tactical decision to forego any probing of such matters. *See Strickland*, 466 U.S. at 691 ("In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.").

¶17 Granados also contends, however, that counsel was ineffective because he failed to "show [Granados] the presentence reports prior to sentencing." He maintains that this failure deprived him of "his right to object to the inaccuracies about his family background, which violated due process." Even assuming, as did the trial court, that counsel's performance in this regard fell below a reasonable professional standard, the court did not abuse its discretion in rejecting Granados's claim because he failed to establish any prejudice. *See Salazar*, 146 Ariz. at 541, 707 P.2d at 945.

¶18 The trial court ruled Granados had not shown prejudice because he had "failed to show that his family background had an impact on his behavior during the commission of the crime that was beyond his control." He argues that *State v. Ross*, 180 Ariz. 598, 886 P.2d 1354 (1994), which the trial court cited in support of its ruling on this point, "has been discredited." According to Granados, "all mitigating evidence must be considered even if there is no showing of a nexus between the mitigating circumstance and the crime." Our supreme court, however, has stated that, although a causal nexus between the mitigating

circumstance and the offense is not required, "the 'lack of a causal nexus between a difficult personal life and the [crime] lessens the effect of this mitigation.'" *State v. Armstrong*, 218 Ariz. 451, ¶ 74, 189 P.3d 378, 392 (2008), *quoting State v. Boggs*, 218 Ariz. 325, ¶ 94, 185 P.3d 111, 130 (2008).

¶19 All of the allegedly newly discovered evidence on which Granados relies was presented to and considered by the trial court in his petition for post-conviction relief. By denying relief, the court implicitly found that none of the new evidence, even had it been available and presented at sentencing, would have likely affected the sentencing calculus or altered the aggravated sentence Granados received. The trial court, of course, is in the best position to make that determination, and nothing in the available record suggests the court abused its discretion.

Disposition

¶20 Accordingly, although we grant the petition for review, we deny relief.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge